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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SOPHIA LORRAINE DAIRE, Defendant and Appellant.	B201976 (Los Angeles County Super. Ct. No. VA096706)

APPEAL from a judgment of the Superior Court of Los Angeles County. Margaret M. Bernal, Judge. Affirmed.

Tara K. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Sophia Lorraine Daire, also known as Candy Mitchell, Sophia Mitchell and Sophia Daria, appeals from a judgment entered upon her conviction by jury of first degree burglary (Pen. Code, § 459).[1] Appellant admitted the special allegations that she had suffered three prior felony convictions within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (a)(1) and (b) through (i) and one prior prison term within the meaning of section 667.5, subdivision (b). After denying appellant's *Romero*[2] motion seeking to dismiss two of her strikes, the trial court sentenced her to a term of 25 years to life on her burglary conviction, plus three consecutive five-year enhancements under section 667, subdivision (a). Appellant contends that (1) there was insufficient evidence to sustain her conviction, thereby violating her rights to due process and a fair trial, (2) instructing the jury with an unmodified version of CALCRIM No. 376 violated her state and federal rights to proof beyond a reasonable doubt and due process, and (3) the trial court abused its discretion by refusing to strike appellant's prior felony strikes, resulting in punishment that was cruel and/or unusual under the federal and state Constitutions.

We affirm.

FACTUAL BACKGROUND

The prosecution's evidence

On the morning of August 9, 2006, Ronald Ryals (Ryals) was staying with a friend, at an apartment on Central Avenue, in the City and County of Los Angeles. Ryals awoke between 10:00 and 11:00 a.m., sat up in bed, and looked out the window. Across the street, he saw a person dismounting a silver bicycle and approaching the apartment complex. The person looked in a trash can in a side yard, but did not remove anything, touched a window screen and then climbed into the front window of an apartment.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Ryals could not see the person's face or determine the person's sex, age, height or facial features, though he believed it was a male. The person was either Latino or African-American, with hair braided into cornrows, and was wearing a Miami Dolphins jersey with the number "50," "51" or "54" on it.

At approximately 12:30 p.m., Ryals and his friend left in his friend's car. As they did, Ryals noticed that the screen on the window he had seen the person enter was cut or damaged and flapping in the wind, and the bicycle was gone.

Deputy Sheriff Mike Fairbanks detained appellant for a traffic stop because she was riding her bicycle on the sidewalk. She looked "weathered," smelled and appeared homeless. Her hair was in an "Afro" in the front, with cornrows in the back. On the police report, Deputy Fairbanks checked the "natural" box, not the "braided" box, for hairstyle.[3] The deputy searched appellant and found 15 to 20 pieces of costume jewelry, a placemat, as well as a shopping bag with children's underwear, soap, body glitter and other items. Appellant had only $11 and change and did not have any type of tools with which to cut a window screen.

Approximately 45 minutes after leaving his apartment, 10 blocks away, Ryals saw Deputy Fairbanks apprehending a person riding a silver bicycle and wearing a Miami Dolphins jersey with the number "54" on it. Ryals spoke to the deputy and reported what he had seen and that he thought the person he had seen was a man.

After speaking with Ryals, Deputy Fairbanks went to the location that Ryals mentioned and found the front door ajar. He saw a torn kitchen-window screen, and an apartment that was messy, with drawers and closets opened and rummaged through. Placemats on the kitchen table matched the placemat confiscated from appellant. No usable fingerprints were found inside.

Leporche Brumfield (Brumfield) lived in the apartment which Ryals had seen the intruder enter. When she left for work early in the morning of August 9, 2006, her

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[3] It is not uncommon in that area of Los Angeles to see people riding bicycles, wearing their hair in cornrows or sifting through garbage cans.

kitchen window screen was not damaged and her house was not in disarray. At work, she received a call from the sheriffs and returned home immediately. She identified the items the deputies had recovered. One of the items of clothing still had the tags on it. She found that $200, costume jewelry, body glitter, a placemat, a disposable camera, underwear, soap and a bag were missing. She later found that some bottles of perfume were also missing.

The defense's evidence

Appellant testified on her own behalf. She had a theft related conviction in 1993. She recycles for a living. On August 9, 2006, she went into Brumfield's garbage bin looking for recyclable items. There, she found a jersey which she put on, about 40 pieces of "mangled" jewelry which she put in her pocket, and a bag sitting next to a trash can, which she took, without looking inside. She denied burglarizing Brumfield's home.

DISCUSSION

I. Sufficiency of the evidence

Appellant contends that her rights to due process and a fair trial were violated because there is insufficient evidence to sustain her conviction. She argues that the evidence failed to establish "that [she] was the person who climbed through the window of Brumfield's apartment. . . . [¶] There was one eyewitness presented at trial. The prosecution's case rested solely on the identification of a football jersey with no other direct or scientific evidence of guilt." The eyewitness testimony was uncorroborated and was given by a person who saw the burglar for only 15 seconds, believed the person was a man and incorrectly identified the person's hairstyle. This contention is without merit.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) We must presume every

fact in support of the judgment that the trier of fact could have reasonably deduced from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, at p. 331.) This standard of review is the same in cases involving circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

There is substantial evidence here identifying appellant as the burglar. There are numerous ways of identifying a suspect. While seeing and recognizing the person's face is the most certain method, other identifying factors, such as physical attributes, clothing and mannerisms may suffice. Ryals described the person who entered Brumfield's apartment by her clothing and other factors. He said the burglar wore a Miami Dolphins jersey, with a number in the 50's on it, and rode a silver bicycle. Ryals further described the intruder as African-American or Latino with hair styled in cornrows. Appellant, an African-American, was detained not far from the scene of the burglary, an hour or so later, wearing such a jersey with the number "54," riding a silver bicycle, and having her hair in cornrows, in the back. Because Ryals saw appellant as she climbed through the window facing his residence, he saw her primarily from the back, where her hair was in cornrows. Because cornrows are worn by both men and women, and the intruder was wearing a sports jersey, it is understandable that he would assume the person was a male. While each of the identifying characteristics of the intruder Ryals articulated was not separately so distinctive, the combination of factors point indisputably, and beyond a reasonable doubt, to appellant.

Appellant's identity as the intruder was corroborated by other evidence. When stopped by Deputy Fairbanks, she possessed 15 to 20 pieces of costume jewelry, a shopping bag containing children's clothing, underwear, soap, body glitter, and a placemat and other items that Brumfield identified as hers. "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt." (*People v. McFarland* (1962) 58 Cal.2d 748, 754

(*McFarland*).) Appellant's claim that she found these items in and around a trash bin at Brumfield's residence lacked credibility and was contradicted by other testimony. Brumfield testified that she had not thrown away any of the items, and Ryals testified that when the intruder opened the trash bin, nothing was removed. Two items are of particular significance. One article of clothing was new and still had the tags on it. The placemat in appellant's possession matched the placemats that the deputies found on Brumfield's kitchen table. It is unlikely that a new item and a placemat that matched a set of placemats on the victim's table would have been found in a trash bin.

II. CALCRIM No. 376

Over defense objection,[4] the trial court instructed the jury in accordance with CALCRIM No. 376 that evidence that appellant knew she possessed stolen property and that the property had in fact been recently stolen was insufficient by itself to convict appellant.[5]

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[4] Defense counsel argued that: "This instruction allows the jurors to take evidence of the fact that my client is in possession of items that are ultimately determined to be of a stolen nature and use that possession in and of itself to find her guilty of the crime of burglary. Notwithstanding, . . . the fact that those items could be obtained completely innocently. She found them, in essence, as abandoned property or lost property. . . . The danger of this instruction is that the jurors will use this instruction or the presence of these items in Ms. Daire's possession to fix a missing element or issue of the People's case. The simple possession of these items, which essentially Ms. Daire has admitted to, do not help the jurors decide if she had anything to do with this residential burglary. And this instruction I think places improper emphasis on the possession of those items and what they are to do with that."

[5] CALCRIM No. 376 as given provides: "If you conclude that the defendant knew she possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of Burglary based on those facts alone. However, if you also find that supporting evidence tends to prove her guilt, then you may conclude that the evidence is sufficient to prove she committed Burglary. [¶] The supporting evidence need only be slight and need not be by itself enough to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove her guilt of Burglary. [¶] Remember that you may not convict the defendant of any crime unless you are convinced

A. Appellant's contention

Appellant contends that the trial court erred in instructing the jury in accordance with CALCRIM No. 376. She argues that that instruction misstates the law by eliminating the requirement that to draw an inference of guilt from possession of stolen property, the possession must be unexplained. She further argues that removal of the explanation requirement and failure to instruct that the lack of explanation must be proved beyond a reasonable doubt, "unconstitutionally shifts the burden of proof to the defendant in violation of the Due Process clause of the 14th Amendment." This contention is without merit.

B. CALCRIM No. 376 does not misstate the law

We review the wording of a jury instruction de novo and assess whether the instruction accurately states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Instructions are reviewed in the context of the entire charge to the jury, rather than in artificial isolation. (*People v. Smithey* (1999) 20 Cal.4th 936, 963–964.)

As previously stated, possession of recently stolen property itself raises a strong inference that the possessor knew the property was stolen, requiring only slight corroboration to permit an inference of guilt. (*McFarland, supra,* 58 Cal.2d at p. 754.) While unexplained possession of stolen property is a circumstance that gives rise to the permissive inference of guilt, it is not the only circumstance. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 947–948 (*Anderson*).) As explained in *Anderson*: "In *McFarland,* the court stated the following rule: 'Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating a consciousness of guilt, an inference of guilt is permissible and it is for the jury to determine whether or not the inference should be drawn in the light of all the evidence.' [Citation.] However, before stating the foregoing rule, the state high court in

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that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

McFarland acknowledged the more general rule that possession of recently stolen property together with other corroborating evidence is sufficient to infer guilt. [Citation.] The court went on to state that a failure to explain or a false explanation of such possession is one type of corroborating evidence. In other words, the court in *McFarland* did not say that possession must be unexplained to be relevant but that the lack of an explanation for possession is one type of corroborating evidence sufficient to support a conviction. [Citation.]" (*Anderson*, *supra*, at p. 948.)

In *Barnes v. United States* (1973) 412 U.S. 837 (*Barnes*), the highest court in the land stated that "[o]f course, the mere fact that there is some evidence tending to explain a defendant's possession [of stolen property] consistent with innocence does not bar instructing the jury on the inference." (*Barnes*, *supra*, at p. 845, fn. 9; see also *People v. Williams* (2000) 79 Cal.App.4th 1157, 1173 [dealing with CALJIC No. 2.15, the predecessor of CALCRIM No. 376, the appellate court stated, "*Barnes* [does not] suggest that no circumstances other than the lack of an explanation can combine with conscious possession of recently stolen property to support an inference of guilt"].) Discussing *Barnes*, *Anderson* states that the court in *Barnes* found no problem with an instruction that "'"[p]ossession of recently stolen property, if not *satisfactorily* explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen. . . ."' In other words, as in *McFarland*, possession of recently stolen property coupled with a lack of explanation is sufficient to support conviction. However, the court did not say this was the only acceptable type of corroborating evidence." (*Anderson*, *supra*, 152 Cal.App.4th at p. 948, italics added.)

These authorities make clear that possession of stolen property need not be unexplained to permit an inference of guilt. CALCRIM No. 376 did not therefore incorrectly state the law by failing to include that *unexplained* possession is the only circumstance that would give rise to that inference. The jury must assess *any* explanation of the possession of stolen property to determine whether it is adequate to preclude the inference.

Contrary to appellant's assertion, CALCRIM No. 376 does not advise the jury to ignore any explanation of the possession of stolen property, "no matter how plausible or compelling." In fact, that instruction specifically informs the jury that it cannot convict the defendant unless convinced that each fact essential to guilt is proved beyond a reasonable doubt, with no limitation on the evidence that may be considered in determining if the People have met that burden. As we stated in *O'Dell*, CALCRIM No. 376 "does not suggest that the jury may ignore a defendant's evidence. [Citation.] It is for the jury to decide whether to make an inference of guilt based upon the totality of the evidence presented. [Citation.]" (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1575 (*O'Dell*).)

Bolstering this conclusion, other instructions required the jury to consider *all* relevant evidence, which includes evidence explaining possession of stolen property. (See CALCRIM No. 220 ["you must impartially compare and consider all the evidence that was received throughout the entire trial"]; CALCRIM No. 222 ["[y]ou must use only the evidence that was presented in this courtroom"].) We presume that the jury followed these instructions. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

C. CALCRIM No. 376 does not violate due process

We similarly reject appellant's claim that failure to include the "no explanation" requirement in CALCRIM No. 376 and to instruct that the prosecution must prove lack of explanation beyond a reasonable doubt violate due process. CALCRIM No. 376 advises the jury that it may not convict appellant on evidence that she possessed stolen property alone. It provides that the jury "may" find sufficient evidence to prove the burglary if, in addition to possession of the stolen property, it finds "supporting evidence tend[ing] to prove her guilt." (CALCRIM No. 376.) The inference that possession of stolen property creates is merely permissive, not mandatory. It neither changes the prosecution's burden of proving every element of the offense or otherwise violates due process. (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1036; *O'Dell, supra,* 153 Cal.App.4th at pp. 1574–1575 [similar language to CALCRIM No. 376 in predecessor CALJIC No. 2.15 "was repeatedly approved in the face of constitutional challenges"].)

III. *Romero* motion

A. Background

Appellant was convicted of first degree burglary and admitted three prior felony convictions within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (a)(1) and (b) through (i) and one prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced her to an aggregate state prison term of 40 years to life, calculated as follows: 25 years to life for her conviction of burglary as a three striker, plus three 5-year, habitual offender enhancements under section 667, subdivision (a)(1). The one-year prior prison term enhancement was stayed.

Before sentencing, appellant filed a *Romero* motion, seeking to dismiss two of her felony strikes. She argued that she was not young (41 years old), her life of crime was the result of poverty, homelessness and drug abuse, her burglaries were primarily of homes where the residents were not present, her current offense was minor and nonviolent, and she would receive a lengthy sentence even if two strikes were dismissed.

The trial court found that appellant had a "substantial career of criminality"[6] and was never out of prison for a substantial time before reoffending. It concluded: "[A]s

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[6] Appellant's criminal history included, among other run-ins with the law: (1) a June 1984 conviction of misdemeanor tampering with a vehicle (Veh. Code, § 10852), for which she was placed on 12 months probation, (2) a June 1985 burglary conviction, for which she received probation, conditioned upon a year in county jail, (3) a February 1987 conviction of first degree burglary, for which she received a four-year sentence, (4) a March 1987 burglary conviction, for which she was placed on three-years formal probation, (5) a September 1989 conviction of taking a vehicle without the owner's consent (Veh. Code, § 10851, subd.(a)), for which she received 16 months in prison, (6) an August 1990 conviction of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), for which she received a two-year sentence, (7) a March 1993 conviction of loitering on private property (§ 647, subd. (h)), for which she was placed on two-years probation, (8) a March 1994 second degree burglary conviction, for which she received a 12-year sentence, and (9) a September 2001 conviction of possession of a controlled substance, for which she received a five-year prison sentence.

much as I understand that, it is her drug problem that is spurring her on to re-offend and do so. There is nothing about this particular offense and its timing and the prior offenses that would indicate any mitigation which would cause me to strike any of them."

B. Contention

Appellant contends that the trial court erred in denying her *Romero* motion. She argues that it based its decision exclusively on her record of recidivism, without considering other individualized factors, including her age, substance abuse, nonviolent nature of her current offense and that her prior offenses were not of increasing seriousness. She claims that these facts regarding her background, character and prospects "amply support the conclusion that she may deemed outside the spirit of the Three Strikes sentencing scheme." Appellant further contends that the 40-year-to-life sentence constituted cruel and unusual punishment under the Eighth Amendment of the federal Constitution and article I, section 17 of the California Constitution because it is not proportionate to the offense. These contentions are without merit.

C. Romero motion

Section 1385 provides in part: "The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) *Romero* held that trial courts have authority to strike a prior conviction pursuant to section 1385. In deciding whether to do so, the trial court must take into account the defendant's background, the nature of his current offense and other individualized considerations. (*Romero*, *supra*, 13 Cal.4th at p. 531.) Striking a serious felony is an extraordinary exercise of discretion and is reserved for "extraordinary" circumstances. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 905.)

Determining what constitutes "'in furtherance of justice'" entails consideration ""'both of the constitutional rights of the defendant, and *the interests of society represented by the People*, ..." At the very least, the reason for dismissal must be "that which would motivate a reasonable judge."'" (*Romero, supra,* 13 Cal.4th at pp. 530–531.) Thus, in deciding whether to strike a prior conviction, "the court in question must

consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the ruling on a *Romero* motion for abuse of discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 378.) "'[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . .'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.)

We begin by rejecting appellant's assertion that the trial court based its denial of her *Romero* motion exclusively on appellant's record of recidivism, without considering other individualized factors. The trial court is "presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Though the trial court focused on appellant's record of recidivism in its oral pronouncement of its ruling, nothing in the record before us suggests that that was all that the trial court considered. To the contrary, the record suggests otherwise. Defense counsel argued a myriad of individualized considerations, which the trial court heard and must have considered and found insufficient to trump appellant's unrelenting record of recidivism, which likely would have been even greater had she not spent substantial periods of time incarcerated. We have found no case that compels a judge to strike a prior conviction where there is an "unrelenting record of recidivism" (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320), and the defendant is "the kind of revolving-door career criminal for whom the Three Strikes law was devised" (*Ibid.*). Spanning a period of more than two decades, appellant had three prior burglary convictions, several burglary arrests and other felony and misdemeanor convictions, interspersed with several significant prison terms.

Further, appellant underestimates the seriousness of her current and prior burglary convictions, characterizing her current offense as "the mundane act of theft by

opportunity." Her current conviction was of first degree burglary, a "serious offense" under section 1192.7. Despite her purported efforts to make certain that she entered a residence at which no one was home, she had no assurance that would be the case. She still risked confronting a resident surprised by the entry. Such confrontations, apart from the fear they cause the resident, present a situation rife with risk of a physical altercation.

Similarly, appellant's attempt to attribute her long record of recidivism to a long standing and serious substance abuse problem is unavailing. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 ["drug addition is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment"].) Furthermore, because of that longstanding problem, appellant's poverty and homelessness, her prospects upon release from prison are dim. This was borne out in the past, when she reoffended shortly after being released from prison.

Appellant's claim that she had a period of 12 years without a serious or violent offense is also unconvincing. During most of that time she was in prison for a March 1994 burglary conviction for which she was sentenced to 12 years in prison.

In conclusion, we cannot say that the trial court abused its very broad discretion in ruling that appellant was not outside the spirit of the three strikes law and denying her *Romero* motion.

D. Cruel and/or unusual punishment

1. Forfeiture[7]

The attorney general contends that appellant forfeited the claim that her sentence constituted cruel and/or unusual punishment by failing to raise it in the trial court.

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[7] While the People use the term "waiver" in reference to appellant's failure to preserve the claim that her sentence constituted cruel and unusual punishment because she did not raise it in the court below, the correct term which we use in this opinion is "'forfeiture.'" "'Waiver'" is the express relinquishment of a known right whereas "'forfeiture'" is the failure to object or to invoke a right. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.)

Appellant argues that her *Romero* motion preserved that claim because the *Romero* motion "developed facts relevant to [the cruel and unusual punishment issue]." We disagree with appellant.

The California Supreme Court has repeatedly held that constitutional objections, like other objections, must be raised in the trial court in order to preserve them for appeal. (See, e.g. *People v. Williams* (1997) 16 Cal.4th 153, 250 [forfeit of First, Eighth, and Fourteenth Amendments]; see also *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8 [forfeit of claim of cruel and unusual punishment].) A *Romero* motion raises the claim that the defendant is outside of the spirit of the three strikes law. It does not assert that the sentence is unconstitutionally cruel and/or unusual. It does not require presentation to the trial court of numerous factors germane to the constitutional claim, such as how the punishment compares with punishment for comparable offenses in California and with other jurisdictions. Without this information, the trial court would not have adequate information to make an informed ruling.

2. The merits

Even if not forfeited, we would reject this claim on the merits. "[I]n our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments . . . ." (*In re Lynch* (1972) 8 Cal.3d 410, 414 (*Lynch*).) "The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible." (*Id*. at p. 423.) "Reviewing courts, . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." (*Solem v. Helm* (1983) 463 U.S. 277, 290, fn. omitted; see also *Lynch*, *supra*, 8 Cal.3d at p. 414.) "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494 (*Martinez*).)

"Nevertheless, a sentence may violate article I, section 17, of the California Constitution if it is so disproportionate to the crime for which it is imposed that it 'shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1413, overruled on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547.) *Lynch* articulated the relevant factors in analyzing whether a punishment is cruel or unusual under the California Constitution; the nature of the offender and the offense, comparison of the punishment with the penalty for more serious crimes in the same jurisdiction, and comparison of the punishment to the penalty for the same offense in different jurisdictions. (*Lynch, supra,* 8 Cal.3d. at pp. 426–427.)

Similarly, under the federal Constitution punishment may be considered unconstitutionally excessive and in violation of the Eighth Amendment's prohibition against cruel and unusual punishment if it is "grossly out of proportion to the severity of [his] crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173; *Harmelin v. Michigan* (1991) 501 U.S. 957, 995.) The Eighth Amendment has a "'narrow proportionality principle'" which prohibits only extreme sentences that are grossly disproportionate to the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20–21 (*Ewing*).) The "disproportionality principle, the precise contours of which are unclear, [are] applicable only in the 'exceedingly rare' and 'extreme' case. . . ." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73 (*Andrade*).) We do not find the federal standard significantly different from the California standard and, if anything, it appears subsumed within the *Lynch* analysis.

Appellant's challenge to her 40-year sentence is not one of those rare cases in which the Legislature has overstepped its bounds and imposed a penalty that is cruel and unusual. The sentence imposed on appellant, under the circumstances presented, does not appear to be substantially more disproportionate than the sentences imposed in *Andrade* or *Ewing*, the United States Supreme Court's most recent pronouncements on the subject. Appellant fails to compare and contrast the facts in those cases with those presented here.

In *Andrade*, the defendant, a heroin addict, was convicted of two counts of petty theft with a prior (§ 666), a "wobbler" offense. He stole videotapes with a total value of

approximately $150 from two stores in order to purchase narcotics. (*Andrade, supra*, 538 U.S. at p. 67.) His prior strike convictions were for three counts of residential burglary. (*Id.* at p. 68.) He was sentenced to two consecutive terms of 25 years to life under the three strikes law. The United States Supreme Court held that the state appellate court's rejection of an Eighth Amendment challenge to the sentence did not contradict or unreasonably apply clearly established federal law within the meaning of title 28 United States Code section 2254(d). It found that the defendant's sentence was not grossly disproportionate. (*Andrade, supra,* at p. 77.)

In *Ewing*, the defendant was convicted of a "'wobbler'" grand theft, for stealing three golf clubs (*Ewing, supra*, 538 U.S. at p. 19) and was sentenced to 25 years to life under the three strikes law. His prior alleged strikes included three burglaries and a robbery. He also had convictions for several other theft offenses, not alleged as strikes. (*Id.* at pp. 18–19.) The United States Supreme Court stated that the defendant's "long history of felony recidivism" should be considered in weighing the gravity of the offense. (*Id.* at p. 29.) It held that the sentence did not violate the Eighth Amendment. (*Id.* at p. 30.)

Given the amorphous nature of the grossly disproportionate principle, its extremely limited application to only the most extreme cases, and the Supreme Court's conclusions in *Ewing* and *Andrade*, appellant's sentence and recidivist history falls squarely within the reach of those cases. Appellant's current offense was far more serious than either of the current offenses in *Andrade* or *Ewing*, and is a "serious offense" under section 1192.7. Nor is appellant's recidivist history so different from those defendants as to compel a different conclusion. Thus, federal authorities indicate that appellant's sentence is not so grossly disproportionate as to violate the Eighth Amendment.

Further, as discussed in part IIIC, *ante*, we find nothing in the nature of appellant and of the offense suggesting that the punishment is inordinate. Appellant's current offense, while not violent, presented a serious risk of violence. Her recidivist history reflected significant criminal activity, including numerous burglaries. A good part of

appellant's sentence is attributable not to punishment for the current charges, but to punishment for her recidivism. "Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823–824.) *People v. Cooper* stated that "[t]he imposition of a 25-year-to-life term for a recidivist offender . . . convicted of a nonviolent, nonserious felony but with at least 2 prior convictions for violent or serious felonies is not grossly disproportionate to the crime." (*Id*. at p. 825.) Here, appellant's current offense was not simply for any felony, but was for a statutorily defined serious felony.

Appellant argues that her punishment is excessive when compared to other offenses. In making this argument, she compares appellant's sentence with the 15-years-to-life sentence for second degree murder, the up to eight-year sentence for rape, and up to 11-year sentence for voluntary manslaughter. This is a comparison of apples to oranges. The sentences for the offenses she has selected to compare with appellant's sentence are for the commission of those offenses, without factoring in recidivism. When prior felony strikes are factored into the equation, appellant's sentence is not disproportionate.

Comparison of the three strikes law with recidivism statutes in other states also indicates that California's statute is not excessive. (See *People v. Martinez, supra,* 71 Cal.App.4th at pp. 1513–1515, surveying three-strike-type statutes in some other states.) Louisiana and Mississippi provide for life without the possibility of parole for a third strike. (*People v. Martinez, supra,* at p. 1516; La. Rev. Stat. Ann. § 15:529.1, subd. A(b)(ii)C; Miss. Code Ann. § 99-19-83.) Delaware imposes life sentences on defendants convicted of specified felonies. (Del. Code Ann., tit. 11, § 4214.) West Virginia, like California, allows the third strike to be any felony, rather than a serious or violent felony. (W. Va. Code, 61-11-18(c).)

Appellant argues that among the numerous states with three-strike-type laws, California's is the most severe. Just because California's law is the most severe does not mean that it is grossly disproportionate to the penalties of other states. There will always

be one state whose sentence is greater than the rest. That fact alone does not render the punishment disproportionate and cruel and unusual. Moreover, to the extent that California's punishment may be viewed as greater than all other states, it need not tailor its sentencing to be in lockstep with other jurisdictions. (*People v. Martinez, supra,* 71 Cal.App.4th at p. 1516.) We do not find California's law to be so out of line with other jurisdictions as to call into question its constitutionality.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD